

Brexit and the reform of social security coordination: The UK's metamorphosis from rule maker to rule taker

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Abstract

This article examines the United Kingdom's negotiating position on the revision of the EU Coordinating Regulations, proposed by the European Commission in December 2016, in the context of Brexit and the negotiations on the Withdrawal Agreement. The Withdrawal Agreement contains provisions on the future coordination of social security for UK and EU nationals who have exercised their freedom of movement rights before the end of the Transition period. The coordination envisaged by the Withdrawal Agreement has not been sealed at the point of the UK's departure but will continue to evolve and incorporate future changes in the EU Coordinating Regulations, including the reforms contained in the Commission's current legislative proposal. The UK had a seat at the negotiating table until it left the European Union on 31 January 2020, which it used to try to influence the reform of the Coordinating Regulations to reflect its future interests. The article finds that while the UK participated in negotiating the current revision of the Coordinating Regulations and several of the revisions are in line with its aims, its influence is waning as the UK moves from being a rule maker to a rule taker in Europe.

Key words: Reform of Social Security Coordination; Brexit; Withdrawal Agreement; Negotiations

1 Introduction

In a referendum on 23 June 2016 the United Kingdom (UK) voted by a very narrow margin to leave the European Union (EU).¹ Almost one year later, on 29 March 2017, the UK Government invoked Article 50 of the Treaty on European Union² to initiate the process of leaving, which, after three extensions, took place on 31 January 2020. In December 2016, between the referendum and the UK Government invoking Article 50 of the Treaty, the European Commission presented a legislative proposal³ to revise the social security coordinating regulations - Regulation (EC) No. 883/2004⁴ and its implementing regulation, Regulation (EC) No. 987/2009.⁵ If adopted, the new Regulation is expected to take effect in 2022⁶ and thus the amendments are unlikely to apply before the UK leaves the *Acquis Communautaire*⁷ which, at the time of writing (April 2020) is scheduled to be at the end of the Transition period⁸ on 31 December 2020. However, the Withdrawal Agreement⁹ published on 17 October 2019 and signed on 24 January 2020 contains provisions on the future coordination of social security for UK and EU nationals who have exercised their freedom of movement rights before the end of the Transition period. The coordination of social security envisaged by the Withdrawal Agreement is not sealed at the point of the UK's departure but is dynamic and will incorporate future changes to the Coordinating Regulations, which will include the reforms contained in the Commission's current legislative proposal. Thus, given the time that pensions take to mature, the Coordinating Regulations are likely to apply to the UK for very many years to come. With this in mind the UK participated in the negotiations to revise the Coordinating Regulations while at the same time negotiating the Withdrawal Agreement.

This article examines the UK's negotiating positions on the proposed revision of the Coordinating Regulations in the context of Brexit and the negotiations on the Withdrawal Agreement. The analysis is based on examination of EU and UK

documentation, including iterations of the Withdrawal Agreement and reports considered by the House of Commons European Scrutiny Committee,¹⁰ informed by interviews during an on-going longitudinal study¹¹ of Brexit and social security coordination with senior policy makers¹² involved with both the negotiations on Brexit and the negotiations on reform of the Coordinating Regulations (hereafter referred to as ‘participants’) in five EU member countries – Austria, Finland, Poland, Spain, the United Kingdom - between July 2017 and July 2019.¹³ The selection of countries is purposive based upon migration stocks and flows,¹⁴ and social security systems.¹⁵ The study finds that while the UK participated in negotiating the current revision of the Coordinating Regulations, and several of the adjustments to the original proposal are in line with its aims, it has made compromises because it is leaving the EU and its influence is perceived by other member countries to have already waned as the UK moves from being an influential rule maker to a rule taker in Europe. The study contributes to the literature on EU law and policy making on coordination of social security;¹⁶ Brexit and social security;¹⁷ and the UK and EU’s approaches to the negotiations of the Withdrawal Agreement¹⁸ and revision of the Social Security Coordinating Regulations.

2 Evolution of the Coordinating Regulations

EU member countries’ social security schemes are coordinated to reduce obstacles to free movement that national social security rules might otherwise present. The House of Commons European Scrutiny Committee noted in February 2017 that “*The current rules on the coordination of social security at EU-level are the product of long and complex negotiations stretching back to the earliest days of the European Economic Community.*”¹⁹ Originally provided for workers by the Treaty of Rome²⁰ and given effect on 1 January 1959 by Regulations 3/58²¹ and 4/58²² to support free movement of labour, the Regulations employ four principle mechanisms²³ to coordinate social security in the context of free movement: ‘Equal treatment’ prohibits discrimination on nationality grounds; rules determine which country is responsible for collecting contributions, determining eligibility and administering benefits and services; periods of residence and social insurance spent in different EU member countries are aggregated to establish benefit entitlement; and territorial boundaries are removed to make some benefits exportable to other member countries.²⁴

Since 1959, the Coordinating Regulations have been reformed on two occasions and continually revised to respond and adjust to Court of Justice of the European Union (CJEU) case law and the member countries’ evolving social security systems. The first revision came in 1972 when Regulation (EEC) No. 1408/71²⁵ and its implementing regulation, Regulation (EEC) No. 574/72²⁶ replaced Regulations 3/58 and 4/58 after long negotiations described by one participant as ‘*Très, très, très, très, très dures*’.²⁷

Regulation (EEC) No. 1408/71 was a more sophisticated development of Regulation 3/58 that extended both the material and personal scope of Coordination.²⁸ Regulation 1408/71 was revised almost annually in response to the continually evolving social security systems of the member countries and plethora of judgments of the CJEU, with the reactive ad hoc revisions increasing complexity and uncertainty for administrators and mobile workers alike. At the Edinburgh Council in 1992, a proposal was made to “modernise and simplify” the Regulations in order to make coordination “more efficient and user-friendly” and to take account of developments in social security schemes and

case law.²⁹ After what were again long and difficult negotiations, Regulation (EC) No. 883/2004³⁰ and its implementing regulation, Regulation (EC) No. 987/2009³¹ became effective on 1 May 2010. The reform again extended the material and the personal scope of coordination, the latter to all persons, including non-economically active people covered by a scheme.³² The House of Commons European Scrutiny Committee stated in February 2017 that the Coordinating Regulations' *"impact on the lives of individual citizens is profound, as they provide a measure of legal and financial clarity about their rights and obligations if they move between Member States."*³³

3 Coordination of Social Security in the Withdrawal Agreement

3.1 The process of withdrawal

Nine months after the referendum, the UK notified the European Council of its intention to leave the EU and withdrawal negotiations began on 19 June 2017.³⁴ The European Commission was appointed by the European Council to negotiate the Withdrawal Agreement on behalf of the EU27 in the two-phase negotiations. Phase 1 comprised three issues - Financial settlement, the Irish border and Citizens' rights (which include free movement and social security coordination) considered by the Council to be priorities on which sufficient progress had to be reached before proceeding to Phase 2 which covered the post-Brexit and Transitional relationship.

After six rounds of discussions, on 8 December 2017, an agreement was reached in principle on the three priority areas. On 28 February 2018, a draft Withdrawal Agreement was published and three weeks later, on 19 March 2018, a further version with the areas that had been agreed highlighted in green.³⁵ The entire section on social security coordination was highlighted to denote agreement had been reached. With minor amendments, the March draft of the section on social security coordination was included in the draft Withdrawal Agreement³⁶ published on 14 November 2018 and endorsed, together with a brief Political Declaration on a Future Framework,³⁷ by the European Council on 25 November 2018.³⁸ The Withdrawal Agreement provides for a 'Transitional period' until 31 December 2020, during which the *Acquis Communautaire* remains in place in the UK. Part Two of the draft Withdrawal Agreement contained the agreed arrangements on citizenship and Title III those on social security coordination. However, following three unsuccessful attempts to get Parliamentary approval for the Agreement she had negotiated, the Prime Minister, Theresa May, resigned and on 23 July 2019 Boris Johnson, who had made a significant contribution to the UK leaving the EU, was elected leader of the Conservative Party and replaced May as Prime Minister. Johnson renegotiated elements of the Withdrawal Agreement including the arrangements for the Irish border, replacing May's Irish 'backstop' with a customs border between Britain and Northern Ireland which will leave Northern Ireland partially aligned to EU rules.³⁹ The new Agreement was concluded on 17 October 2019 and signed by both parties separately on 24 January 2020.⁴⁰ Part Two, Title III on coordination of social security, remained unchanged from the Agreement May had concluded in November 2018.⁴¹

3.2 Perceptions of the negotiations of Part Two, Title III of the Withdrawal Agreement on social security coordination

During the withdrawal negotiations the UK faced a negotiating team at the European Commission with a mandate from a united EU-27. This contrasted with a perception

among the EU-27 that the UK's position was uncertain. Indeed, the Spanish participant felt that the UK negotiators had been focused on British public opinion:

"Well ... I have the feeling and we have the feeling in Spain that ... the United Kingdom negotiation is not sometimes with the Union but with their own citizens, and that is the problem." (Spain, 2017).

The continuing uncertainty of the UK's negotiating position was identified by the Austrian participant a year later in 2018:

"We have the impression that within the UK there are different powers, one power wants more compromise, a closer relationship, while there are others who would go for a hard Brexit so the outcome depends very much on the developments in the UK and this is hard to foresee." (Austria, 2018).

The EU-27's position, however, was perceived to be well prepared, well coordinated and unanimously supported. The Finnish participant said:

"The negotiation was driven by the Commission and ... all of the countries agreed that the best way forward is to stick together, a common view was taken that if we stick together then the negotiations won't become fragmented." (Finland, 2019).

The Polish participant expressed a similar perspective:

"We were united ... from the beginning; there was a decision that we should be together, stick together because ... in the negotiating position, especially small member countries towards the UK is not symmetrical, the decision was to keep a united approach and that was a very important lesson for all of us and as for now I think, all member countries are still at this position" (Poland, 2019).

The Finnish participant explained that:

"For social security coordination it was easy to find a common position, because it is such a very old and stable part of the EU law and everyone working within this sector knows that the best way forward is to have common rules for all of these multilateral situations rather than bilateral rules because that complicates everything." (Finland, 2019).

Participants said that the negotiations on the social security coordination element of the Withdrawal Agreement were driven at a fast pace by the Commission. The Commission had proposed the articles that were included as Part Two, Title III in the March 2018 document and now form the Withdrawal Agreement, and although the member countries had been involved when the text was originally being prepared, the speed of the negotiations meant that, after that, it was not easy to influence the document with little room to depart from the initially agreed text.

"Our experience was there was always immense time pressure, so the Commission tried not to give too much time to think." (Austria, 2018).

“There were meetings of group of Article 50 in Brussels ... the meetings ... were well organised, but from my point of view there was not much room for discussion, many times it was quite fast and the agenda was full, overfull and they worked at very good pace.” (Poland, 2019).

The UK participant expressed a similar perspective of the speed of negotiations:

“Yes, because otherwise you would still be discussing this now, you would never get to the position that we have so far, if you’re waiting to discuss all of these wider issues so I think there was this time factor as well, there were certain deadlines that they had to meet and given that nothing was agreed from the start and it was a negotiation, it was give and take, although I’m not sure who gave and who took in the process, and it got right to the wire and therefore you’ve got no time to discuss or think about the consequences of what this means in the future.” (UK 2018).

Participants said that they had been invited late in the day to propose changes to some issues and points on the proposed social security coordination arrangements which they thought were unclear, *“because we insisted on having a possibility at least to have a common understanding on these provisions.” (Austria, 2018).*

However, while Member States were able to comment on the Guidance Note to Part Two, Title III on social security coordination in the March 2018 Agreement they were told by the Commission that there was no possibility to change the text, only to help to clarify the meaning:

“At the meeting last week in Brussels the Commission said this is the text, and also confronted us with their understanding and their interpretation with concrete examples. However, the text is so complex that it is very difficult to apply in practice... We might have some possibility to add other examples if these are in line with what the Commission wants but it will only be if there is a really problematic issue that Member States might insist on a change, otherwise the Commission will say that they have a mandate to present to the UK. And for the UK if this is the position of the 27 on interpretation it is very, very difficult for them to say we see it totally differently.” (Austria, 2018).

Under the Withdrawal Agreement the UK will continue to coordinate the social security of people who have exercised their free movement rights before the end of the Transition period for at least several decades into the future. The Coordinating Regulations are dynamic and will continue to evolve in response to Judgments of the CJEU and future changes to Member States’ social security systems. With some exceptions to changes to the material scope and exportable benefits, the UK will have to apply future reform and revision of the Regulations without being able to contribute to those reforms. Article 34 of the Withdrawal Agreement provides for the UK to have a limited presence with Observer status in the Administrative Commission⁴² and to be present in an advisory role when the items on the agenda are relevant.⁴³ Article 34 also provides for the UK to take part in the Electronic Exchange of Social Security Information (EESSI)⁴⁴ and to bear the related costs. Article 36 provides for the UK and EU to inform a Joint Committee of relevant changes to the UK’s domestic legislation and the Coordinating Regulations after the end of the Transition period.⁴⁵ To ensure consistent application of the Agreement, Article 158 provides for a UK court or tribunal,

in a case which has commenced at first instance within eight years from the end of the Transition period, to request the CJEU to give a preliminary ruling on a question, the legal effect of which in the UK will be the same as a preliminary ruling in the Union and its Member States under Article 267 TFEU.⁴⁶

4 The European Commission's 2016 proposal for reform of the Social Security Coordinating Regulations

4.1 The proposal

On 13 December 2016, the European Commission proposed a revision of the Social Security Coordinating Regulations,⁴⁷ following a call from the European Parliament for review.⁴⁸ The Commission proposed: to introduce new arrangements for unemployment benefits; to clarify the circumstances in which Member States can limit access to social benefits for economically inactive EU mobile citizens; to introduce a separate Chapter to establish a coherent regime for the coordination of long-term care benefits; to establish new provisions for the coordination of family benefits intended to replace income during child-raising periods, listed in Part 1 of Annex XIII of Regulation (EC) No. 883/2004; to strengthen the rules on social security coordination for posted workers in order to prevent abuse; and several reforms to improve the administration of the Regulations.⁴⁹

The current proposal is aligned with the Labour Mobility Package to continue the modernisation of social security coordination proposed at the Edinburgh Council in 1992 and introduced by Regulations (EC) No. 883/2004 and (EC) No. 987/2009 in 2010, with the aim of *“further facilitating the exercise of citizens' rights while ensuring legal clarity, a fair and equitable distribution of the financial burden among the Member States and administrative simplicity and enforceability of the rules.”*⁵⁰

On 3 March 2017, the European Council held an orientation debate on the proposed revision of the Coordinating Regulations, at which Damian Hinds, the UK's Minister of State for Employment, participated, on the basis of a Presidency Note, to brief the recently established Working Party. The Presidency's Note identified a *“lack of agreement on a series of elements and issues, including the extension of unemployment benefits. Indexation is a particularly contentious issue and currently gives rise to diverging and contrasting views. It is clear that there are various elements related to equal treatment and posting of workers that need further clarification.”*⁵¹

A partial general approach to the Commission's proposal, on equal treatment and determination of applicable legislation, was agreed by EU Employment Ministers on 23 October 2017.⁵² The EPSCO Council⁵³ agreed its negotiating position (general approach) on 21 June 2018.⁵⁴ The Council Presidency and the European Parliament reached a provisional agreement, following the Trilogue meetings.⁵⁵ However, this was rejected at the Coreper⁵⁶ meeting on 29 March 2019. The Parliament Plenary voted on 18 April 2019 to leave the first reading procedure open to the following parliamentary term with a decision taken on the October 2019 Plenary that the text is *“unfinished business to be carried over.”*⁵⁷

In contrast to the reforms that led to the introduction of Regulation (EEC) No. 1408/71 and Regulation (EC) No. 883/2004, which required unanimity in the Council, agreement on the reforms proposed by the Commission in 2016 requires a qualified

majority and *“in some situations when it was evident that there was a qualified majority in the Council there was quite a strong push for a compromise even though there was a relatively large proportion of Member States who were very strongly against.... There was perhaps too strong a push for a fast compromise.... For the unemployment chapter, for example, there has been a kind of backlash, when the compromise in Trilogue was perceived to have gone too far.”* (Finland, 2019).

4.2 “Prudent for the Government to participate fully in the negotiations”

The UK Government is required to report progress on the negotiations on reform of social security coordination to the House of Commons European Scrutiny Committee. On 8 February 2017 the European Scrutiny Committee suggested that in light of the European Commission’s Explanatory Memorandum⁵⁸ that there was *“no general consensus on the changes needed”* concerning the restriction of benefits for persons who are economically inactive and that member country governments had *“divergent views”* on amending aggregation and export of unemployment benefit, there is *“a strong likelihood that negotiations on this proposal will be protracted and demanding. It is in any case unlikely the new Regulation will enter into effect before the UK’s intended exit from the EU.”*⁵⁹

Despite considering it unlikely that the new Regulation would enter into effect before the UK’s intended exit, the European Scrutiny Committee expressed concern that, in his report, the Minister had omitted the Government’s usual statement that it would continue to *“negotiate, implement and apply EU legislation”* until the conclusion of negotiations to leave the EU, and informed the Minister that the Government should approach the negotiations on the revision of the Coordinating Regulations as if the amended rules will apply to the UK, concluding with advice that:

*“Regulation 883/2004 (as amended) could, should the Government so wish, be incorporated into such an agreement subject to any modifications that were acceptable to the UK and EU. As such, we consider that it would be prudent for the Government to participate fully in the negotiations on this proposal to ensure the final legislation is aligned with the UK’s priorities.”*⁶⁰

The Committee repeated its advice to the Minister in November 2017: *“for as long as the UK remains an EU Member State it should continue to negotiate new EU legislation to ensure it reflects the UK’s interests.”*⁶¹

The revision of the Coordinating Regulations was discussed during several sessions of the Council of the European Union’s Working Party on Social Questions⁶² where prior to leaving the EU on 31 January 2020 the UK had participated fully. Participants said that the UK had traditionally made a strong contribution in Council Working Parties including, for example, during the development of Electronic Exchange of Social Security Information (EESSI):

“The UK has continued to be active in working groups, including, for example, the Electronic Exchange of Social Security Information project in which they have invested a lot time and expertise and have continued to contribute since Article 50 was invoked.” (Finland, 2019).

Participants felt that the UK’s participation in the negotiations indicated an:

“understanding in the UK that in one form or another (the UK) would be willing to apply these rules in the future and are trying to affect them as long as they can from the inside for as long as they are members and they can have a say.” (Finland, 2019).

The UK participant explained:

“The issue is that if we will not be applying EU law, then... how will somebody else accept us contributing to the shaping of that law? ... We don't expect to do that, unless we will continue applying it and given that we will be applying 883 is the reason why we said we wanted a seat at the table.” (UK, 2018).

4.3 “Willingness to compromise on amendments to the social security rules that it considers less than ideal”

The Council of the European Union is, alongside the European Parliament, the EU's main decision-making body where government ministers from each member country meet to coordinate policies and reform legislation. Decisions are usually arrived at by consensus or by qualified majority. A qualified majority requires 55% of countries (16 out of 28 while the UK was still a member) to vote in favour. The countries voting in favour must represent 65% or more of the total EU population. At least four countries, representing 35% of the total EU population, are required to block a decision.⁶³ Voting is, therefore, weighted by population size which means that larger Member States (France, Germany, Italy and the UK)⁶⁴ can, if they are opposed to a proposal, form a blocking minority and are thus rarely outvoted by the other Member States.⁶⁵

During the negotiations member countries formed alliances to seek to achieve qualified voting majorities. However, these alliances did not map consistently across the different substantive issues:

“You can have different alliances because of the structure of your social security system ... or the forms of migration... There are different alliances for legislation applicable and unemployment benefits, so it is really, really complicated. There are many things on which we have a common understanding like long-term care benefits, family benefits and miscellaneous amendments but it is a package with two parts, with the legislation applicable and unemployment which are sensitive, and so everything has to be onboard.” (Finland, 2019).

The UK participated in these alliances adopting positions on the substantive issues in line with its traditional positions. In his Explanatory Memorandum of 4 January 2017, the Minister of State for Employment (Damian Hinds) wrote to the House of Commons European Scrutiny Committee:

“The full policy implications will only become clearer when the proposals have been developed further through the negotiations. In general terms however, some of the proposals codifying recent CJEU case law on access to benefits are considered to be useful clarifications which create more legal certainty and support the UK position of requiring a person to have a right to reside in the United Kingdom in order to access certain benefits as upheld by the CJEU in C-308/14 Commission v United Kingdom.”

⁶⁶

On 22 November 2017, the Minister informed the Committee that the Estonian Presidency would be looking for a second partial general approach, on long-term care benefits and family benefits, at the 7 December EPSCO Council and explained that the Government was *“prepared to accept the current text”* as the proposed coordination of long-term care benefits *“should not have any financial impact for the UK”*; and as the UK does not have any family benefits intended to replace income during child-raising periods listed in Part 1 of Annex XIII of Regulation (EC) No. 883/2004, there should *“only be a limited financial impact”*.⁶⁷

The UK Government had greater concerns over the Commission’s proposals to amend the rules for coordinating unemployment benefits. In an update to the Committee on 24 April 2018, the Minister stated that the Government’s negotiating strategy had been concentrated on how to *“limit the Commission’s proposals on extending the period during which [unemployment benefit] may be exported to another Member State, and reduce the administrative burden surrounding the proposals”*.⁶⁸

The Minister explained to the Committee that the Commission’s proposals on unemployment benefit have been *“substantially amended”* as a result of discussions between Member States and reported that the Council is likely to seek to discard the extension to six months for exporting unemployment benefit while seeking work in another member country, as proposed by the Commission, in favour of retaining the existing three month statutory minimum period.⁶⁹

With respect to the aggregation of contributions, the Minister reported that the UK Government had *“supported a longer waiting period than the current one day”*⁷⁰ before contributions paid in another Member State can be used to qualify for unemployment benefit and informed the Committee that the Member States had compromised to agree a minimum qualifying period of one month rather than permitting aggregation after one day of employment, under the current arrangement, or three months in the Commission’s proposal.⁷¹ With regard to frontier workers, the Minister told the Committee that the Government welcomed the proposal to abolish the provisions on reimbursement which it considered to be *“cumbersome to administer and a source of disagreement between the UK and other Member States”*.⁷²

The Minister concluded his letter of 24 April 2018 by telling the Committee that the UK *“has thus far secured many of its objectives for the package of reforms”*.⁷³ However, Ministers repeatedly stated to the Committee that the UK had needed to make compromises that it might not have felt the need for if it had not been leaving the EU. For example, on 23 May 2018, the Committee noted that the Minister *“has specifically cited the loss of the UK’s institutional representation in March 2019 as one of the drivers for the Government’s willingness to compromise on amendments to the social security rules that it considers less than ideal, notably those allowing frontier workers to choose which Member State - that of employment or of residence - should pay their unemployment benefit.”*⁷⁴

The Minister wrote in his letter - with reference to frontier workers - that while the Government *“would have preferred not to see the introduction of new circumstances in which individuals may opt to receive benefit paid by one [EU country] in another”*, if the UK attempted to undo the compromise it would probably lead to the loss of the limitations on the export of unemployment benefit, which is one of the Government’s

main objectives in the negotiations, as *“most [Member States] see the UB provisions as a package.”*⁷⁵

The Committee noted that *“on this occasion it is likely that the UK’s full support will be needed in order to secure a Qualified Majority in favour of the proposal”* and that *“It is unclear whether the Regulation will still command the necessary majority among Member States if the vote is held after the UK’s exit.”*⁷⁶

With this in mind, in his letter dated 26 March 2019, the Minister for Employment (Alok Sharma) told the Committee, that it was *“preferable for the file to be concluded whilst the UK retains a seat at the negotiating table and on a text which it had helped shape”* despite not supporting all of the legal changes.⁷⁷

Prior to leaving the EU on 31 January 2020 the UK had enjoyed a 12.61% share of the vote in the Council⁷⁸ which had been *“the key vehicle for exercising UK power and influence in the EU.”*⁷⁹ During the negotiations on reforming the Social Security Coordinating Regulations, the UK had sought to play its traditional leading role as a big country:

“The big countries have an active role because their vote counts more, and they of course have negotiations behind closed curtains ...” (Finland, 2019).

However, Brexit weakened the UK’s hand in the negotiations:

“I would have expected the UK to have built a blocking minority that could stop the revision of 883 or the revision of the Posted Workers Directive and just such a threat would have a big influence including a bigger influence on the shape of provisions establishing European Labour Authority... My feeling is that the UK was not so strong during the revision of the Posted Workers Directive and the revision of 883 as well as establishing the European Labour Authority.... The voice of the UK was heard. Positions were presented but there was no diplomatic activity like other Member States because I suppose there was a feeling within the UK delegation that we don’t know where we will be in the next, for example, six or twelve months.” (Poland, 2019).

France and Germany led the search for common ground and compromise and participants felt that France would be the main beneficiary of the UK’s departure:

“For example, France, Germany and Italy are stronger now and France as for now is a winner on Brexit because the labour mobility package is in line with many of the wishes and needs of France. With regard to the situation with the unemployment benefits chapter, many things are in line with the position of France.” (Poland, 2019).

5 Conclusion: From rule maker to rule taker

On 9 April 2016, Michael Gove, the then Secretary of State for Justice and Lord High Chancellor of Great Britain, and a key architect of Brexit, told the UK electorate:

*“The day after we vote to leave, we hold all the cards and we can choose the path we want.”*⁸⁰

This study of the UK's role in the simultaneous and linked negotiations of the future coordination of social security in the Withdrawal Agreement for people who have exercised their free movement rights before the end of the Transition period and the reform of the Coordinating Regulations in the context of Brexit finds that the UK does not have a strong suit of cards to play in negotiations with the EU-27. While the Minister claimed to have achieved many of the UK's goals, the negotiations of the reform of the Coordinating Regulations show that the UK's influence is waning as it steps back from its role constructing and leading alliances leaving France and Germany to lead the search for workable compromises. The irony is that a key stated aim of Brexit is to "take back control".⁸¹ Control implies agency, and this study finds that in the case of social security coordination, the UK has achieved the opposite as the window to shape the Coordinating Regulations that - unless the UK leaves without a deal – it will operate under the Withdrawal Agreement for several decades into the future has closed and a country that has been an influential rule maker at the heart of EU policy making for almost half a century metamorphoses into a rule taker.

END NOTES

¹ Electoral Commission: <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum>

² Article 50 of the Treaty on European Union. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 326, 26.10.2012.

³ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) COM/2016/0815 final - 2016/0397 (COD)

⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; *OJ L 166, 30.4.2004*.

⁵ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems *OJ L 284/1 30.10.2009*.

⁶ www.parliament.uk House of Commons European Scrutiny Committee Documents considered by the Committee on 3 April 2019, chapter 11 DWP Brexit: Coordination of social security and access to healthcare <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-lx/30102.htm>

⁷ “The EU’s ‘acquis’ is the body of common rights and obligations that are binding on all EU countries, as EU Members.” EUR-Lex: <https://eur-lex.europa.eu/summary/glossary/acquis.html>

⁸ The Transition period is provided for in the Withdrawal Agreement. It started when the UK left the EU on 31 January 2020 and is scheduled to end on 31 December 2020. During the Transition period the UK remains within the Acquis Communautaire.

⁹ Working document - Consolidated version of the Withdrawal Agreement following revision of Protocol on Ireland/Northern Ireland and technical adaptations to Article 184 “Negotiations on the future relationship” and Article 185 “Entry into force and application” (document TF50(2019)64), as agreed at negotiators’ level and endorsed by the European Council; - Subject to legal revision. TF50 (2019) 66 – Commission to EU 27, 17 October 2019.

¹⁰ The European Scrutiny Committee is appointed under Standing Order No. 143 and consists of 16 members, drawn from the three largest political parties. The Committee “assesses the legal and/or political importance of draft EU legislation deposited in Parliament by the Government. This amounts to around 1,100 documents a session. The Committee receives an Explanatory Memorandum on each document from the relevant Minister. It then looks at the significance of the proposal and decides whether to clear the document from scrutiny or withhold clearance and ask questions of the Government. All documents deemed politically or legally important are reported on in the Committee’s weekly Reports.”

<https://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/role/>

¹¹ Roberts, S. ‘The Devil Is in the Detail: Some Early Thoughts of EU Policy Makers on Negotiating Post-Brexit Coordination of Social Security’, in: Pichrt and Koldinska, (Eds), *Labour Law and Social Protection in a Globalized World*. Wolters Kluwer, The Netherlands (2018); Roberts, S. (2019). ‘Social security coordination after Brexit: Trying to take an egg out of an omelette?’ *ERA Forum*, Issue 4/2019.

¹² I am enormously grateful to the participants in this study who have given their time so generously to share their knowledge, expertise and insight. Any misunderstandings are of course my responsibility.

¹³ Ethical clearance for the study was approved by the relevant University of Nottingham Research Ethics Committee.

¹⁴ European Commission, 2018 Report on intra-EU Labour Mobility 8.2.2019; Office for National Statistics, Living abroad: British residents living in the EU: April 2018.

¹⁵ Arts W. and Gelissen J. (2002) Three worlds of welfare or more? *Journal of European Social Policy* 12(2) 137-158; Esping-Andersen, G. (1990), *The three worlds of welfare capitalism*, Cambridge: Polity Press; Fenger, H. (2007). Welfare regimes in Central and Eastern Europe: Incorporating post-communist countries in a welfare regime typology. *Contemporary Issues and Ideas in Social Sciences*, 3(2), 1–30; Ferrera, M. (1996) The southern model of welfare in social Europe in *Journal of European Social Policy*, February, vol. 6 no. 1 17-37.

¹⁶ There is an extensive literature on social security coordination that looks at the origins and early history (Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower; Watson, P. (1980), *Social security law of the European Communities*. London, Mansell); achievements of coordination after 50 years (Cornelissen R. (2010), *Achievements of 50 years of European social security coordination*. In: 50 Years of Social Security Coordination, Past-Present-Future, ed. Jorens, Y., Publications Office of the European Union, Luxembourg); evolution of legal principles (Pennings, F. (2015) *European Social Security Law*, 6th edition, Antwerp, Intersentia.); specific principles of coordination, including the applicable legislation

(Christensen, A. and Malmstedt M. (2000), 'Lex loci laboris versus lex loci domicilii — An inquiry into the normative foundations of European social security law'. *European Journal of Social Security* Vol. 2, Issue 1, 2000; Pennings, F. (2005), 'Co-ordination of Social Security on the Basis of the State-of-employment Principle: Time for an Alternative?', *Common Market Law Review*, 42(1); the concept of residence (Cornelissen, R. (1996), 'The principle of territoriality and the Community regulations on social security (Regulations 1408/71 and 574/72)', *Common Market Law Review* 33; Martinsen, D. (2005) 'Social Security in the EU: the de-Territorialisation of Welfare?' in de Búrca, G. (ed.) *EU Law and the Welfare State. In Search of Solidarity*, Oxford University Press). Studies have looked at coordination from a national perspective. (Sakslin, M (2000), 'The concept of residence and social security: Reflections on Finnish and Swedish and Community legislation', *European Journal of Migration and Law* 2(2)); including the interface of coordination with UK legislation (Roberts, S. (2000) 'Our view has not changed: The UK's response to the proposal to extend coordination of social security to third country nationals' in *European Journal of Social Security*, vol. 2, issue 2; Cousins, M. (2007), 'The "right to reside" and social security entitlements', *Journal of Social Welfare and Family Law*, 29:1.). Previous reforms have been examined (Pennings, F. (2001), 'The European Commission Proposal to Simplify Regulation 1408/71', *European Journal of Social Security*, 3(1); Pennings, (2009), 'Introduction: Regulation 883/2004 – The Third Coordination Regulation in a Row', *European Journal of Social Security*, Vol. 11, issues 1-2).

¹⁷ There is a growing body of academic literature on Brexit, including the post-Brexit social security rights for people who have moved between the UK and the EU27 prior to the end of the Transition period (Guild, E.: (2017) *Brexit and Social Security in the EU*, CEPS Commentary: Thinking ahead for Europe; Verschueren, H. (2017), *Scenarios for Brexit and social security*, *Maastricht Journal of European and comparative law* 24:3; Jorens, Y. and Strban, G. (2017) *New Forms of Social Security for Persons Moving Between the EU and the UK in After Brexit*, Eds. da Costa Cabral, N., Renato Gonçalves, J., Cunha Rodrigues, N., Springer International Publishing; Harris, N. (2018), *Welfare rights, austerity and the decision to leave the EU: influences on UK social security law*. *Journal of Social Security Law* Vol. 25, No. 1.

¹⁸ Roberts, S. 'The Devil Is in the Detail: Some Early Thoughts of EU Policy Makers on Negotiating Post-Brexit Coordination of Social Security', in: Pichrt and Koldinska, (Eds), *Labour Law and Social Protection in a Globalized World*. Wolters Kluwer, The Netherlands (2018); Roberts, S. (2019). 'Social security coordination after Brexit: Trying to take an egg out of an omelette?' *ERA Forum*, Issue 4/2019.

¹⁹ House of Commons European Scrutiny Committee Thirty-first Report of 2016-17, chapter 8 DWP Coordination of social security systems: 74

<https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/71-xxix.pdf>

²⁰ *Traité instituant la Communauté Economique Européenne* <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT&from=EN>

²¹ Regulation No 3 (OJ 30, 16.12.1958).

²² Regulation No 4 (OJ 30, 16.12.1958).

²³ Pennings, F. (2015) *European Social Security Law*, 6th. edition, Antwerp, Intersentia.

²⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; *OJ L 166, 30.4.2004*; Pennings, F. (2015) *European Social Security Law*, 6th. edition, Antwerp, Intersentia.

²⁵ Regulation (EEC) No 1408/71 (OJ L 149, 5.7.1971).

²⁶ Regulation (EEC) No 574/72 (OJ L 74, 27.3.1972).

²⁷ Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower.

²⁸ Holloway, J. (1981), *Social policy harmonisation in the European Community*. Farnborough, Gower; Watson, P. (1980), *Social security law of the European Communities*. London, Mansell.

²⁹ Pennings, F. 'The European Commission Proposal to Simplify Regulation 1408/71', *European Journal of Social Security*, 3(1), 2001, p. 45-60.

³⁰ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; *OJ L 166, 30.4.2004*.

³¹ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems *OJ L 284/1 30.10.2009*.

³² Pennings, 'Introduction: Regulation 883/2004 – The Third Coordination Regulation in a Row', *European Journal of Social Security*, Vol. 11, issues 1-2, 2009, pp. 3-8.

³³ House of Commons European Scrutiny Committee Thirty-first Report of 2016-17, chapter 8 DWP Coordination of social security systems:74

<https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/71-xxix.pdf>

³⁴ European Commission: https://ec.europa.eu/ireland/news/key-eu-policy-areas/brexit_en

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- ³⁵ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018, TF50 (2018) 35 – Commission to EU27.
- ³⁶ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14.11.2018.
- ³⁷ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom 22 November 2018.
- ³⁸ European Council: <https://www.consilium.europa.eu/en/meetings/european-council/2018/11/25/>
- ³⁹ House of Commons Library, *Brexit and the Northern Ireland border*, 14 January 2020: <https://commonslibrary.parliament.uk/brexit/policy/brexit-and-the-northern-ireland-border/>
- ⁴⁰ Working document - Consolidated version of the Withdrawal Agreement following revision of Protocol on Ireland/Northern Ireland and technical adaptations to Article 184 “Negotiations on the future relationship” and Article 185 “Entry into force and application” (document TF50(2019)64), as agreed at negotiators’ level and endorsed by the European Council; - Subject to legal revision. TF50 (2019) 66 – Commission to EU 27, 17 October 2019.
- ⁴¹ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018.
- ⁴² “The Administrative Commission for the coordination of social security systems comprises a representative of the government of each EU country and a representative of the Commission. It is responsible for dealing with administrative matters, questions of interpretation arising from the provisions of regulations on social security coordination, and for promoting and developing collaboration between EU countries”
<https://ec.europa.eu/social/main.jsp?catId=857&langId=en&intPageId=983>
- ⁴³ Working document - Consolidated version of the Withdrawal Agreement following revision of Protocol on Ireland/Northern Ireland and technical adaptations to Article 184 “Negotiations on the future relationship” and Article 185 “Entry into force and application” (document TF50(2019)64), as agreed at negotiators’ level and endorsed by the European Council; - Subject to legal revision. TF50 (2019) 66 – Commission to EU 27, 17 October 2019.
- ⁴⁴ “EESSI is an IT system that helps social security institutions across the EU exchange information more rapidly and securely, as required by the EU rules on social security coordination”
<https://ec.europa.eu/social/main.jsp?catId=869>
- ⁴⁵ Working document - Consolidated version of the Withdrawal Agreement following revision of Protocol on Ireland/Northern Ireland and technical adaptations to Article 184 “Negotiations on the future relationship” and Article 185 “Entry into force and application” (document TF50(2019)64), as agreed at negotiators’ level and endorsed by the European Council; - Subject to legal revision. TF50 (2019) 66 – Commission to EU 27, 17 October 2019.
- ⁴⁶ Working document - Consolidated version of the Withdrawal Agreement following revision of Protocol on Ireland/Northern Ireland and technical adaptations to Article 184 “Negotiations on the future relationship” and Article 185 “Entry into force and application” (document TF50(2019)64), as agreed at negotiators’ level and endorsed by the European Council; - Subject to legal revision. TF50 (2019) 66 – Commission to EU 27, 17 October 2019; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, *Official Journal C 326*, 26/10/2012 P. 0001 – 0390.
- ⁴⁷ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) COM/2016/0815 final - 2016/0397 (COD)
- ⁴⁸ European Parliament Procedure File 2013/2111(INI) Social protection for all, including self-employed workers <https://oeil.secure.europarl.europa.eu/oeil/popups/printficheglobal.pdf?id=627439&l=en>; European Parliament Legislative Train Schedule Revision of Regulation on Social Security Coordination – Labour Mobility Package/2016-12 <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-jd-revision-of-regulation-on-social-security-labour-mobility-package>
- ⁴⁹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) COM/2016/0815 final - 2016/0397 (COD)

⁵⁰ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) COM/2016/0815 final - 2016/0397 (COD)

⁵¹ Council of the European Union, 6927/17 4 EN Coordination of social security systems
<https://www.consilium.europa.eu/media/22166/st06927en17-v2.pdf>

⁵² House of Commons European Scrutiny Committee Fourth Report of Session 2017-19. Documents considered by the Committee on 6 December 2017, chapter 8 DWP Coordination of social security systems:
<https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-iv/301-iv.pdf>

⁵³ The Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) “brings together ministers responsible for employment, social affairs, health and consumer policy from all EU member states. Relevant European Commissioners also participate in meetings.”

European Council <https://www.consilium.europa.eu/en/council-eu/configurations/epsco/>

⁵⁴ European Parliament Legislative Train Schedule Revision of Regulation on Social Security Coordination – Labour Mobility Package/2016-12 <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-jd-revision-of-regulation-on-social-security-labour-mobility-package>

⁵⁵ “Negotiations between the institutions on legislative proposals generally take the form of tripartite meetings (trilogues) between Parliament, the Council and the Commission... Trilogues may be organised at any stage of the legislative procedure.... Any provisional agreement reached in trilogues is informal and has therefore to be approved by the formal procedures applicable within each of the two institutions.” (Council and Parliament).
<https://www.europarl.europa.eu/ordinary-legislative-procedure/en/interinstitutional-negotiations.html>

⁵⁶ “The Permanent Representatives Committee or Coreper (Article 240 of the Treaty on the Functioning of the European Union - TFEU) is responsible for preparing the work of the Council of the European Union. It consists of representatives from the EU countries with the rank of ambassador to the European Union and is chaired by the EU country which holds the Council Presidency. Coreper occupies a pivotal position in the EU's decision-making system. It is both a forum for dialogue (among the Permanent Representatives and between them and their respective national capitals) and a means of political control (guidance and supervision of the work of the expert groups).” <https://eur-lex.europa.eu/summary/glossary/coreper.html>

⁵⁷ European Parliament Legislative Train Schedule Revision of Regulation on Social Security Coordination – Labour Mobility Package/2016-12 <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-jd-revision-of-regulation-on-social-security-labour-mobility-package>

⁵⁸ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (Text with relevance for the EEA and Switzerland) COM/2016/0815 final - 2016/0397 (COD)

⁵⁹ House of Commons European Scrutiny Committee Thirty-first Report of 2016-17, Documents considered by the Committee on 8 February 2017, chapter 8 DWP Coordination of social security systems: 74
<https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/71-xxix.pdf>

⁶⁰ House of Commons European Scrutiny Committee Thirty-first Report of 2016-17, Documents considered by the Committee on 8 February 2017, chapter 8 DWP Coordination of social security systems: 75
<https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/71-xxix.pdf>

⁶¹ House of Commons European Scrutiny Committee First Report of Session 2017-19. Documents considered by the Committee on 13 November 2017, chapter 15 DWP Coordination of social security systems: 153
<https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-i/301-i.pdf>

⁶² The Working Party on Social Questions deals with all legislative work related to employment and social policy, including coordination of social security systems: <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-social-questions/>

⁶³ European Union ‘Council of the European Union’ https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en; European Council/Council of the European Union, ‘Qualified Majority’: <https://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>; EUR-Lex ‘Weighting of votes in the Council’: https://eur-lex.europa.eu/summary/glossary/weighting_votes_council.html

⁶⁴ European Parliament, ‘Changed rules for qualified majority voting in the Council of the EU’. *At a glance*. European Parliamentary Research Service. Authors: Conall Devaney and Eva-Maria Poptcheva, Members' Research Service, December 2014:

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- ⁶⁵ Wright, G., Stojanovic, A. and Klemperer, D. (2020) *Influencing the EU after Brexit*, Institute for Government: https://www.instituteforgovernment.org.uk/sites/default/files/publications/influencing-EU-after-brexit_2.pdf.
- ⁶⁶ House of Commons European Scrutiny Committee Thirty-first Report of 2016-17, Documents considered by the Committee on 8 February 2017, chapter 8 DWP Coordination of social security systems: 75 <https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxix/71-xxix.pdf>
- ⁶⁷ House of Commons European Scrutiny Committee Fourth Report of Session 2017-19. Documents considered by the Committee on 6 December 2017, chapter 8 DWP Coordination of social security systems: 68 <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-iv/301-iv.pdf>
- ⁶⁸ House of Commons European Scrutiny Committee Twenty-ninth Report of Session 2017-19. Documents considered by the Committee on 23 May 2018, chapter 6 DWP Coordination of social security systems: 38 <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-xxviii/301-xxviii.pdf>
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